THE POWER OF THE STATE TO OUST CORPORATIONS FOR DOING ULTRA VIRES ACTS.—A company was incorporated by a special act of the legislature for the purpose "of constructing and maintaining a dam across X river, and one or more locks in connection with said dam; and of creating a water power to be used by said corporation, for manufacturing purposes," and to be sold or leased to the proprietors of other factories and mills. A limitation was placed upon the amount of real estate that the company might hold. Eleven years after the organization of this company, B company was incorporated by another special act of the legislature "for the purpose of upholding and maintaining the dam constructed by the A company, the locks and canals in connection with the dam, and for creating and furnishing water power." No restriction was imposed upon the right of this company to take and hold real estate, the statute simply providing that, exclusive of the property of the A company, it might acquire "any other real estate that may be required for the use of said corporation for the purposes contemplated by this act." Immediately after its organization, B company purchased large tracts of lands some parcels of which are located in the heart of the business and residential district of the city of Y, and from a half-mile to a mile and a half distant from the site of the dam, locks and canal. The company is not using these parcels of land for any purposes incidental to their corporate business, but has adopted a policy of leasing them for long terms of years, and, as a result, the city of Y is suffering greatly.

To what relief, if any, is the city entitled?

At the outset, it must be conceded that the city cannot, of its own motion, do anything to better the situation; for the doctrine is firmly established that, in cases of this character, the state alone can complain. The contract exists only between the corporation and the state; and for a breach thereof by the former it is amenable only to the sovereign power which created it. *Miller* v. *American Tobacco Co.*, 55 N. J. Eq. 352, 42 Atl. 1117; *Colorado Springs Co.* v. *American Publishing Co.*, 97 Fed. 843; *Delta Duck Club* v. *Barrios*, 135 La. 357, 65 So. 489; *Illinois Life Ins. Co.* v. *Beifield*, 184 Ill. App. 582; *Chase & Baker Co.* v. *National Trust & Credit Co.*, 215 Fed. 633; *Mansfield* v. *Neff*, 43 Utah, 258, 134 Pac. 1160; *New Hartford Water Co.* v. *Village Water Co.*, 87 Conn. 183, 87 Atl. 358; *Milton* v. *Crawford*, 65 Wash. 145, 118 Pac. 32; *Plummer* v. *Chesapeake & Ohio R. Co. of Ky.*, 143 Ky. 102, 136 S. W. 162; *Terre Haute & P. R. Co.* v. *Robbins*, 247 Ill. 376, 93 N. E. 398; *Marks* v. *Amer. Brewing Co.*, 126 La. 666, 52 So. 983; *Rachels* v. *Stecher Cooperage Works*, 95 Ark. 6, 128 S. W. 348; *Ill. Steel Co.* v. *Warras*, 141 Wis. 119, 123 N. W. 656; *Evangelical Baptist Benevolent & Missionary Society* v. *City of Boston*, 204 Mass. 28, 90 N. E. 572; *Bowman* v. *J. H. Trainor Co.*, 93 Ark. 435, 124 S. W. 1019; *Knowles* v. *Northern Texas Traction Co.* (Tex. Civ. App. 1909), 121 S. W. 232; *Puget Sound National Bank of Seattle* v. *Fisher*, 52 Wash. 246, 100 Pac. 724; 8 HARV. LAW REV. 15; V THOMPSON, LAW OF CORPORATIONS, § 5797.

But will the state, at the request of the city, interfere in this case? In the case of *People* v. *Pullman Palace Car Co.*, 175 Ill. 125, the court held that the act of the corporation in building and controlling a village for the

benefit and accommodation of its employees was an ultra vires act, as the company was incorporated for the sole purpose of manufacturing, leasing, and operating its cars. It did not appear that the company was prompted by any willful intent to violate the terms of its charter, its only object being to erect schools, churches, homes, stores, etc., for the betterment, education, and comfort of its employees. Yet the court was constrained to say that "a power which a corporation may exercise by implication must be bounded by the purposes of the corporate existence and the terms and intention of the charter, and acts which tend only remotely and indirectly to promote its interests and chartered objects cannot be justified by implication of law, but are ultra vires." It can hardly be disputed that the acts of the Pullman Company did tend "remotely and by indirection" to promote its interests and corporate object. Every one of the ultra vires acts was done by the company with the intention of enlarging and promoting the interests of the very business in which its charter empowered it to engage. The case simply illustrates how the courts will check a corporation in its endeavor to include within the "corporate objects" acts which are not incidentally and impliedly necessary to the attainment of that object. For similar cases, see *Bridgeport* v. *Railroad Co.,* 15 Conn. 475, and *Mayor* v. *Yuille,* 13 Ala. 137.

Admittedly, the parcels of land in question were, in the first instance, legally acquired by the B company; but that fact affords no proof that they are being legally used at the present time. The acts of this company certainly constitute more palpable transgressions of the corporate power than did the acts of the Pullman Company; for it is manifest that the conducting of a real estate business does not tend either remotely or by indirection to promote the interests of a corporation which was created for the purpose of furnishing water-power to its own and neighboring factories. Furthermore, the company is estopped by its own acts from insisting upon holding the parcels of land for any anticipated future corporate purposes. The land being located in the business and residential district, and the company having leased it for terms of twenty-five and fifty years, it is quite apparent that the city will have developed to such an extent before the expiration of the leases that the erection of factories on the lots will never be tolerated. *Dauchy Iron Works* v. *Gunder,* 150 Ill. App. 604.

In the *Pullman Company* case the court ordered the sale of the land and buildings which the corporation was illegally holding; but it refused to annul the charter. This decision is typical of the attitude of the courts towards corporations which have overstepped the bounds of their chartered authority. There has been an almost total departure from the doctrine of special capacity, so that today we find the courts basing their decisions squarely upon that most unsubstantial something known as judicial discretion. Happily, this dangerous innovation has not, as yet, resulted in any miscarriages of justice; due, perhaps, to the fact that the courts have adopted a very simple rule for the guidance of their discretion. Unless they discover that "there is a clear, willful misuse, abuse, or non-use of the franchises sought to be forfeited, or violation of law,—something that strikes at the very groundwork of the contract between the corporation and the sovereign

power; something that amounts to a plain, willful abuse of power or violation of law within the meaning of the statute on the subject, whereby the corporation fails to fulfill the very design and purpose of its organization,—leave will not be granted by the court to resort to the extraordinary remedy for forfeiture of its charter." This language, which was used by the court in *State ex rel. Att'y Gen.* v. *Janesville Water Co.,* 92 Wis. 496, very forcibly expresses the modern tendency of the courts. To the same effect, see *State ex rel. Prosecuting Att'y.* v. *Commercial Bank,* 10 Ohio, 535; *State ex rel.* v. *Farmers' College,* 32 Oh. St. 487; *Att'y Gen.* v. *E. K. R. Co.,* 55 Mich. 15; *State of Missouri ex rel. Att'y Gen.* v. *National School of Osteopathy,* 76 Mo. App. 439; *State of Ohio ex rel. Att'y Gen.* v. *Oberlin Bldg. & Loan Ass'n,* 35 Oh. St. 258; *State of Vermont* v. *President, Director and Company of the Essex Bank,* 8 Vt. 489; *State* v. *Tampa Water Works Co.,* 56 Fla. 858, 48 So. 639; *Big Four Advertising Co. of Phoenix* v. *Clingan,* 15 Ariz. 34, 135 Pac. 713; *State, on the inf. of Wear* v. *Business Men's Athletic Club,* 178 Mo. App. 548, 163 S. W. 901; *State ex inf. Hadley* v. *Rosehill Pastime Athletic Club,* 121 Mo. App. 81, 97 S. W. 978; *State ex inf. Hadley* v. *Kirkwood Social Athletic Club,* 121 Mo. App. 87, 97 S. W. 980; *State* v. *French Lick Spring Hotel Co.* (Ind. App. 1907), 82 N. E. 801; *Jackson Loan and Trust Co.* v. *State,* 96 Miss. 347, 56 So. 293.

The People v. *The Pullman Palace Car Co.,* 175 Ill. 125, and *State of Mo. ex rel. Att'y Gen.* v. *National School of Osteopathy,* 76 Mo. App. 439, are the two cases that stand out pre-eminently as illustrations of the dogmatic refusal of the courts to enforce the doctrine of special capacities. In both of those cases the corporations were attempting to fulfill "the very design and purpose of their organization"; but they failed therein, because they assumed that their charters empowered them to do acts which, as a matter of fact, were ultra vires. On the other hand, the case of *People ex rel. Att'y Gen.* v. *Illinois Health University,* 166 Ill. 171, presents a set of facts which demonstrates exactly what the courts mean when they speak of a corporation which must be ousted because of its failure to fulfill "the very design and purpose of its organization." In that case the defendant, which was incorporated for the purpose of training medical students, established its "institution of learning" in two small office-rooms, and indiscriminately conferred diplomas upon all applicants provided they were prepared to pay the requisite fee.

In the case under discussion we find that the ultra vires acts of the B company, although injurious to the city, are not "so substantial and continued as to so derange or destroy the business of the corporation that it no longer fulfills the end for which it was created." (*State of Minnesota ex rel. Att'y Gen.* v. *Minnesota Thresher Mfg. Co.,* 40 Minn. 213.) Just as in the *Pullman* case, the B company is doing acts which the state never intended that it should do. True, the acts of this company more nearly approximate a willful abuse of power, and are more remotely removed from any relation to corporate interests than were the acts of the Pullman Company; but this company, like the Pullman Company, is still actively and successfully engaged in conducting its legitimate corporate business. It is

inconceivable that more harm would result in this case by allowing the legal and disallowing the illegal than resulted in the *Pullman* case. The difference between the acts of the two companies being merely one of degree, the courts, in order to be consistent, ought to apply the same principles to both cases. There was a time when the B company would have been ousted without any hesitation or procrastination, but, under the new order of things, it is hardly possible that the court would order anything more drastic than that the B company dispose of the property which it is illegally holding and using. *Com.* v. *Newport, L. & A. Turnpike Co.*, 97 S. W. 375, 29 Ky. Law Rep. 1285, 100 S. W. 871, 30 Ky. Law Rep. 1235; *Att'y Gen.* v. *Consolidated Gas Co. of N. Y.*, 108 N. Y. Supp. 823, 124 App. Div. 401; *State* v. *Nashville Baseball Club*, 127 Tenn. 292, 154 S. W. 1151; *Louisville School Board* v. *King*, 127 Ky. 824, 107 S. W. 247, 32 Ky. Law Rep. 687. M. McL.

THE INTERPRETATION OF "DEATH" AND "SURVIVAL" ACTS.—The recent case of *Klann* v. *Minn.*, 154 N. W. 996, decided by the Supreme Court of Wisconsin, calls attention to the interpretation in the various states of the two statutes affecting the civil liability of one who through his wrongful acts causes the death of another, which has resulted in a decided conflict of authority. One statute, known generally as the "DEATH ACT" (modelled after LORD CAMPBELL'S ACT) gives a right of action for the pecuniary loss suffered by surviving relatives by reason of the death; the other statute, known as the "SURVIVAL ACT," gives a right of action to the personal representative of the deceased, for the loss which accrues to the injured person before death. *Brown* v. *C. & N. W. Ry.* 102 Wis. 137, 171.

For the measure of damages under the "DEATH ACT" see *Irwin* v. *Pa. R. Co.*, 226 Pa. St. 156, 75 Atl. 19, and cases cited in the note on that case in 8 MICH. L. REV. 501. The measure of damages under the "SURVIVAL ACT" is discussed in *Kyes* v. *Valley Telephone Co.*, 132 Mich. 281, and *Olivier* v. *Houghton County St. Ry. Co.*, 138 Mich. 242. In *Johnson* v. *Eau Claire*, 149 Wis. 194, it is said: "The damages recoverable when death occurs instantly are the pecuniary losses sustained by relatives of the deceased named in the Act, and must be paid over by the administrator to such relatives. The damages recoverable under the new right of action allows the administrator to prosecute, for the benefit of the estate, the claim that the party would have had if he had lived. These damages include: pain and suffering, permanent disability, disfigurement, moneys by him expended for medical attendance and nursing, loss of earning capacity after majority, and, in case of emancipation, loss of earning capacity during minority as well." Since the damages recoverable under the two statutes depend on different circumstances and vary so widely, it is not strange that much litigation has resulted from the endeavor to recover under one or both of these statutes.

The principal point of difference in the different jurisdictions seems to be on the question whether the two statutes give two rights of action for the same death, or whether the rights of action conferred by the two are exclusive one of the other. See 15 HARV. L. REV. 854. Michigan holds that